Office Supreme Court, U.S.
FILED
MAR 27 1970
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 1099

BANGOR AND AROOSTOOK RAILROAD COMPANY, ET AL., *Petitioners,*

v.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, *Respondent.*

PETITIONERS' REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

SHEA & GARDNER
734 Fifteenth Street, N.W.
Washington, D. C. 20005
Of Counsel.

FRANCIS M. SHEA
RICHARD T. CONWAY
WILLIAM H. DEMPSEY, JR.
734 Fifteenth Street, N.W.
Washington, D. C. 20005

JAMES A. WILCOX
1225 Connecticut Ave., N.W.
Washington, D. C. 20036
Attorneys for Petitioners.

TABLE OF CITATIONS

Cases:

	Page
American Airlines, Inc. v. *Air Lines Pilots Ass'n Inter.*, 169 F. Supp. 777 (S.D.N.Y., 1958)	6
Butte, Anaconda & P. Ry. Co. v. *Brotherhood of Loc. Fire. & Eng.*, 268 F. 2d 54 (9th Cir., 1959)	6
Detroit and Toledo Shore Line R. Co. v. *United Transportation Union*, 38 Law Week 4033 (1969)	4
Locomotive Engrs. v. *L. & N. R. Co.*, 373 U.S. 33 (1963)	2
Manning v. *American Airlines, Inc.*, 329 F. 2d 32 (2d Cir., 1964), cert. den., 379 U.S. 817 (1964)	6
Missouri-Illinois R. Co. v. *Order of Railway Conductors*, 322 F. 2d 793 (8th Cir., 1963)	6
National Airlines, Inc. v. *International Ass'n of M. & A. W.*, 416 F. 2d 998 (5th Cir., 1969)	6
Piedmont Aviation, Inc. v. *Air Line Pilots Ass'n, Internat'l*, 416 F. 2d 633 (4th Cir., 1969), cert. den., 38 Law Week 3315 (1970)	6
Pullman Company v. *Order of Railway Conductors & Brakemen*, 316 F. 2d 556 (7th Cir., 1963) cert. denied, 375 U.S. 820 (1963)	6
Railroad Trainmen v. *Terminal Co.*, 394 U.S. 369 (1969)	2, 4
Railroad Yardmasters v. *Pennsylvania Railroad Co.*, 224 F. 2d 226 (3rd Cir., 1955)	6
Railway Clerks v. *Florida E.C.R. Co.*, 384 U.S. 238 (1966)	2
Rutland Railway Corp. v. *Brotherhood of Locomotive Engineers*, 307 F. 2d 21 (2d Cir., 1962)	6, 8
Southern Ry. Co. v. *Brotherhood of Locomotive Firemen, Etc.*, 337 F. 2d 127 (D.C. Cir., 1964)	6
Telegraphers v. *Chicago & N.W. R. Co.*, 362 U.S. 330 (1960)	4, 5
Trainmen v. *Chicago R. & I. R. Co.*, 353 U.S. 30 (1957)	2
Trainmen v. *Toledo, P. & W. R. Co.*, 321 U.S. 50 (1944)	4, 5
United States v. *Mine Workers*, 330 U.S. 258 (1947)	8

Miscellaneous: Page

Norris-LaGuardia Act:

Section 4 ..... 1, 5, 8
Section 7 ..... 6, 7
Section 8 ..... 1, 5, 8

Railway Labor Act:

Section 3 2
Section 6 6

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 1099

BANGOR AND AROOSTOOK RAILROAD COMPANY; ET AL., *Petitioners,*

v.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, *Respondent.*

PETITIONERS' REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

In the petition for writ of certiorari, we demonstrated (pp. 15-23) that the decision by the court below conflicts with decisions of this Court (as well as with decisions of other courts of appeals) in "accommodating" the Railway Labor Act and the Norris-LaGuardia Act by holding that some provisions of the Norris-LaGuardia Act (Section 8 in particular) apply to restraints against violations of the Railway Labor Act even though other provisions (Section 4 in particular) do not. This Court has consistently held that none of the provisions of the Norris-LaGuardia Act apply to injunctions enforcing the mandates of the Railway Labor Act.

A careful reading of the Brief in Opposition (pp. 7-13) will disclose that respondent does not fundamentally dispute our contention that the approach by the court below in "accommodating" the two Acts is not reconcilable with the

approach which has been taken by this Court. But respondent has attempted to create the impression that this Court has held that the Norris-LaGuardia Act is applicable to prevent injunctions against strikes over major disputes under the Railway Labor Act. As we show below, however, when a strike over a major dispute violates the Railway Labor Act—as did the strikes here—the Norris-LaGuardia Act is inapplicable and the strike may be enjoined.

Disputes over the interpretation of existing collective bargaining agreements in the railroad industry are known as "minor" disputes, while disputes over changes in those agreements are known as "major" disputes. Minor disputes not settled in conferences between the parties are subject to compulsory arbitration by adjustment boards under Section 3 of the Railway Labor Act (45 U.S.C. § 153), a strike over such a dispute therefore violates the mandates of the Act whether such strike occurs before or after arbitration, and Norris-LaGuardia is completely inapplicable to restraints against such illegal strikes. *E.g., Locomotive Engrs.* v. *L. & N. R. Co.*, 373 U.S. 33 (1963); *Trainmen* v. *Chicago R. & I.R. Co.*, 353 U.S. 30 (1957). In major disputes, on the other hand, a settlement is not imposed on the parties by compulsory arbitration or otherwise; rather, they are required to exhaust procedures that "are purposely long and drawn out, based on the hope that reason and practical considerations will provide in time an agreement that resolves the dispute" and may resort to "self-help" after those procedures are exhausted. *Railway Clerks* v. *Florida E.C.R. Co.*, 384 U.S. 238, 246 (1966).

The requirements of the Railway Labor Act in regard to major disputes were succinctly stated by this Court, in *Railroad Trainmen* v. *Terminal Co.*, 394 U.S. 369, 378-379 (1969), as follows:

> "The Act provides a detailed framework to facilitate

the voluntary settlement of major disputes. A party desiring to effect a change of rates of pay, rules, or working conditions must give advance written notice. § 6. The parties must confer, § 2 Second, and if conference fails to resolve the dispute, either or both may invoke the services of the National Mediation Board, which may also proffer its services *sua sponte* if it finds a labor emergency to exist. § 5 First. If mediation fails, the Board must endeavor to induce the parties to submit the controversy to binding arbitration, which can take place, however, only if both consent. §§ 5 First, 7. If arbitration is rejected and the dispute threatens 'substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President,' who may create an emergency board to investigate and report on the dispute. § 10. While the dispute is working its way through these stages, neither party may unilaterally alter the *status quo*. §§ 2 Seventh, 5 First, 6, 10.

"Nowhere does the text of the Railway Labor Act specify what is to take place once these procedures have been exhausted without yielding resolution of the dispute. Implicit in the statutory scheme, however, is the ultimate right of the disputants to resort to self-help—'the inevitable alternative in a statutory scheme which deliberately denies the final power to compel arbitration.' *Florida E.C.R. Co.* v. *Railroad Trainmen,* 336 F. 2d 172, 181 (1964). We have consistently so held in a long line of decisions. *Railway Clerks* v. *Florida E.C.R. Co.,* 384 U.S. 238, 244 (1966); *Locomotive Engineers* v. *Baltimore & O. R. Co.,* 372 U.S. 284 (1963); *Railroad Telegraphers* v. *Chicago & N.W. R. Co.,* 362 U.S. 330 (1960); *Elgin, J. & E. R. Co.* v. *Burley,* 325 U.S. 711, 725 (1945)."

See, also, *Detroit and Toledo Shore Line R. Co.* v. *United Transportation Union,* 38 Law Week 4033, 4035 (1969). And, this Court also pointed out in the *Terminal Co.* case that the right to self-help implicit in the statutory scheme, once the procedures of the Act have been exhausted in a major dispute, includes strikes of the carriers involved in the dispute. 394 U.S., at 384.

Accordingly, a strike over a major dispute normally would not violate any of the mandates of the Railway Labor Act if the strike occurs after the procedures specified by the Act have been exhausted, but would violate the *status quo* requirements of the Act if the strike occurs before those procedures have been exhausted. Under the accommodation which we understand this Court to have made between the Railway Labor Act and the Norris-LaGuardia Act, therefore, Norris-LaGuardia could be applicable to a strike over a major dispute after the procedures of the Railway Labor Act have been exhausted, but could not apply to such a strike if those procedures have not been exhausted. This in fact is the manner in which the two Acts have been accommodated in regard to strikes over major disputes.

Telegraphers v. *Chicago & N.W. R. Co.,* 362 U.S. 330 (1960), and *Trainmen* v. *Toledo, P. & W. R. Co.,* 321 U.S. 50 (1944), referred to at pages 8, 9-11 and 11-12 of the Brief in Opposition, both involved strikes over major disputes after the procedures of the Railway Labor Act had been exhausted (see 362 U.S., at 349-351; 321 U.S., at 51-53). In *Telegraphers,* therefore, this Court distinguished *Trainmen* v. *Chicago, R. & I.R. Co.,* 353 U.S 30 (1957), which "held that a strike could be enjoined to prevent a plain violation of a basic command of the Railway Labor Act," on the ground that no violation of the Railway Labor Act was involved so that Norris-LaGuardia applied to prohibit an injunction against the strike. 362 U.S., at 338-339. In *Toledo,* no one contended that the strike violated the Rail-

way Labor Act or that Norris-LaGuardia was inapplicable. Rather, the carrier sought injunctive relief against violence pursuant to Section 7 of Norris-LaGuardia (29 U.S.C. § 107), and this Court simply held that the carrier had to comply with Section 8 (29 U.S.C. § 108) in order to obtain an injunction under Section 7, which it had not done. 321 U.S., at 54-66.

Unlike the court below in this case, this Court in its *Telegraphers* and *Toledo* decisions did not purport to accommodate the two Acts by picking and choosing among the various provisions of Norris-LaGuardia so as to find some applicable and some inapplicable. In *Toledo,* no one contended that any mandate of the Railway Labor Act had been violated and the Court refused to make an exception for Section 8 (321 U.S., at 65) in applying Norris-LaGuardia. In *Telegraphers,* the Court concluded that no mandate of the Railway Labor Act had been violated and distinguished the cases holding that Norris-LaGuardia does not apply to injunctions enforcing the mandates of the Railway Labor Act on that ground. Thus, the Court relied upon Section 4 of Norris-LaGuardia (29 U.S.C. § 104; 362 U.S., at 335), among others, while the court below in this case conceded that Section 4 is inapplicable under the circumstances involved here (Pet., App. B, at 32). We submit, therefore, that *Telegraphers* and *Toledo* afford no support to the decision below and, indeed, are consistent with and reinforce our analysis in the petition of the manner in which this Court has accommodated the Railway Labor and Norris-LaGuardia Acts.

While this Court has not directly decided whether Norris-LaGuardia applies so as to bar injunctive relief against a strike over a major dispute prior to the exhaustion of the procedures of the Railway Labor Act, the Court has made clear that a strike in such circumstances would violate the mandates of the Railway Labor Act (see pp. 2-4, *supra*)

and, in other circumstances, that Norris-LaGuardia does not deprive the courts of jurisdiction to compel compliance with the mandates of the Railway Labor Act (see Pet., at pp. 15-20). Thus, the lower courts have consistently recognized that a "strike called before completion of the major dispute procedures, like a change made by the carrier, is unlawful and may be enjoined pending compliance with the [Railway Labor] Act." *National Airlines, Inc.* v. *International Ass'n of M. & A. W.*, 416 F. 2d 998, 1002-1003 (5th Cir., 1969). See, *e.g.*, *Piedmont Aviation, Inc.* v. *Air Line Pilots Ass'n, Internat'l*, 416 F. 2d 633, 636 (4th Cir., 1969), cert. den., 38 Law Week 3315 (1970); *Southern Ry. Co.* v. *Brotherhood of Locomotive Firemen, Etc.*, 337 F. 2d 127, 132-133 (D.C. Cir., 1964); *Manning* v. *American Airlines, Inc.*, 329 F. 2d 32, 34 (2d Cir., 1964), cert. den., 379 U.S. 817 (1964); *Railroad Yardmasters* v. *Pennsylvania Railroad Co.*, 224 F. 2d 226, 228 (3d Cir., 1955); *American Airlines, Inc.* v. *Air Line Pilots Ass'n, Inter.*, 169 F. Supp. 777, 783-789 (S.D.N.Y., 1958).[1]

In this case, of course, respondent had not exhausted the procedures of the Railway Labor Act in regard to its demand that the carriers restore the National Diesel Agreement to full force and effect upon the expiration of the Award by Arbitration Board No. 282. Indeed, respondent had not served the written notice required by Section 6 of the Railway Labor Act (45 U.S.C. § 156) in regard to that demand and, while respondent had served Section 6 notices of proposals to establish rules requiring the use of firemen on

[1] The lower court decisions cited in footnote 4, page 8, of the Brief in Opposition are not to the contrary. The *Missouri-Illinois* and *Pullman Company* cases involved major disputes in which the procedures of the Act had been exhausted, but recognized that a strike may be enjoined where those procedures have not been exhausted (322 F. 2d, at 796, 798; 316 F. 2d, at 564), and the Ninth Circuit in the *Butte* case noted that "[i]njunctive relief may be utilized by either party to vindicate the processes of the Railway Labor Act" (268 F. 2d, at 60). The *Chicago & N.W.* and *Rutland* cases involved minor, rather than major, disputes.

most locomotives, those proposals had not even been subject to mediation by the National Mediation Board when the strikes occurred.[2] The suggestion by respondent (Brief in Opposition, at 3) that it struck over petitioners' refusal to bargain about those proposals prior to the expiration of Award 282 is contrary to its contentions at the time of the strikes and is without warrant in the record. As the Court below noted in its Coercive Contempt Opinion (380 F. 2d, at 574), respondent "declared" at the time of the strikes that they were "solely in regard to a proposed fireman-training program unrelated to the manning question covered by the Arbitration Award." Respondent struck when Award 282 expired, not when the refusals to bargain occurred, and all the affidavits before the district court at the time the temporary restraining orders were entered were to the effect that the strike was in support of respondent's unlawful demand that the prior rules be restored to full force and effect when Award 282 expired.[3] Moreover, the court

---

[2] The parties so stipulated in paragraph Q, Part I, of their April 30, 1966 Stipulation.

[3] In regard to the quotations from the Affidavit of James E. Wolfe (Brief in Opposition, at 3), we note that respondent has omitted the bulk of that Affidavit which demonstrated that respondent was demanding not merely bargaining but also restoration of the National Diesel Agreement of 1950 upon expiration of the Award. For example, Mr. Gilbert was quoted as voicing "a threat of a strike, if necessary, to restore a 1950 agreement requiring employment of firemen on all diesel locomotives, if an agreement with the carriers has not been reached on the issue by March 31" (Affidavit, at 11), and Mr. Deering was quoted as stating that the "railroads must either restore firemen to locomotives or face a strike on major lines" (Affidavit, at 13-14). Upon the basis of this and other information, Mr. Wolfe concluded that "the BLF&E upon the expiration of Arbitration Award 282 as to firemen (helpers) intends to strike the plaintiffs in an effort to force them to comply with the position of the BLF&E respecting the effect of the expiration of Award 282" (Affidavit, at 14). When the strikes actually occurred, the temporary restraining order was supplemented to enjoin specifically the continuance of the strikes upon the basis of affidavits asserting that the strikes were intended to require petitioners to restore the prior rules to full force and effect. Respondent did not file any affidavits prior to the issuance either of the temporary restraining order or of the supplement thereto.

below held in its Merits Opinion (385 F. 2d, at 597) that the effect of petitioners' refusal to bargain was to permit respondent to "move to the next tier of procedures" required by the Act—mediation by the National Mediation Board—rather than to permit respondent to strike.

Thus, the court below did not base its decision upon a holding that the strikes did not violate the Railway Labor Act; if it had so held, all of Norris-LaGuardia including Section 4 would have been applicable. Rather, as we have shown in the petition, the court below erred in concluding that some of the provisions of Norris-LaGuardia may apply to injunctions requiring compliance with the mandates of the Railway Labor Act, under its understanding of how the two Acts are to be "accommodated," and in holding that Section 8 of Norris-LaGuardia was applicable to the restraining orders issued in this case even though Section 4 of Norris-LaGuardia was inapplicable. We believe that we have demonstrated that that holding conflicts with decisions of this Court and of other courts of appeals [4] and involves an important issue of federal law which should be reviewed by this Court.

In regard to our contention that the Court should review the holding below that recovery of compensatory contempt damages is barred if the District Court was mistaken in its view that Section 8 of Norris-LaGuardia was completely inapplicable (Pet., at 23-27), respondent in effect contends that the decision by this Court in the *Mine Workers* case is dispositive (Brief in Opposition, at 13-16). We believe

[4] In footnote 15 on page 21 of the Petition, we pointed out that only the decision by the Second Circuit in the *Rutland* case, of those cited by the court below, lends support to its approach to the accommodation of the two Acts. That statement also applies to the decisions cited in the Brief in Opposition. We note that Mr. Justice (then Judge) Marshall dissented in the *Rutland* case (307 F. 2d, at 42-48), and would have enjoined both sides to comply with the Railway Labor Act including an injunction against the strike.

that we have demonstrated the contrary in the petition, and we continue to urge that this issue also is deserving of review by this Court.

Conclusion

For the reasons stated above and in the Petition, the petition for writ of certiorari should be granted.

Respectfully submitted,

SHEA & GARDNER
734 Fifteenth Street, N.W.
Washington, D. C. 20005
Of Counsel.

FRANCIS M. SHEA
RICHARD T. CONWAY
WILLIAM H. DEMPSEY, JR.
734 Fifteenth Street, N.W.
Washington, D. C. 20005

JAMES A. WILCOX
1225 Connecticut Ave., N.W.
Washington, D. C. 20036
Attorneys for Petitioners.

(9229-6)